IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

LYNN HARRIS,
Petitioner,
V.
THOMAS CARROLL, Warden et. al.,
Respondants.

Civ. Act. No. 06-789***

PETITIONERS POINTS AND AUTHORITIES TO PETITIONERS TRAVERSE

Point 1. The State Court's Unreasonable Determination of Facts Necessary To The Disposition of Grounds One, Two and Three.

The reasonableness of the State Courts fact determination on the issue of whether police had reasonable articulate suspicion is frusterated in several respects. One is that the Court relied on "hindsight." The State Court manipulated the facts discovered after Petitioner's seizure to justify the officers reasonable suspicion that criminal activity was present. Two is the Court's minipulative use of "terminology" characterizing an "anonymous tipster's" identity into that of an anonymous "concerned citizen." Three is the manipulative use of the terminology that the anonymous 911 caller used in their discription, and the actual evidence seized in that the Court replaces the 911 callers discriptions with those of the evidence

Petitioners Points

Page 2

recovered and described in Court testimony.

The "factual layout" of these types of cases always begins with the date and time of the 911 call. US v Robertson 90 F.3d 75 (3rd cir 1996); Florida v J.L. 529 US 266 (2000); Jones v State 745 A.2d 856 (Del. 1999); Caldwell v State 770 A2d 522 (Del. 2001); Accord: US v Nash 2002 WL 31500920 (D. Del.); Riley v State 892 A2d 370 (Del 2006) (citing Woody v State 765 A2d 1257 (Del 2001); Purnell v State, 832 A2d 714 (Del 2003); Quarles v State 696 A2d 1334 (Del 1997); Cummings v State 765 A2d 945 (Del 2001). (However in the instant case it is readily apparant that the Delaware State Courts have accented the Petitioners guilt over his Constitutional Rights, adhering the the Machevellian pomeriple that the ends justify the means in this case where Petitioner accepted full responsibility for his actions by explaining to the judge what happened, the planning etc. It is disputed whether Petitioner renounced his participation.)

Using the "formula" the above Courts have used to determine the State of Delaware Terry stop codified in 11 Del C § 1902. A state created right arbitrarily denied to Petitioner. Hicks v Florida 447 US 343 (1980). The "factual layout" consists of the following as in our Third Circuit Roberson, U.S. Supreme Courts J.L and Delaware Supreme Courts Jones cases. The questions presented in these cases all involve a "concerned citizens" anonymous tipster's 911 call discribing: "suspicious individuals", "their clothing discriptions," "their suspected activity"

and the Third Circuit and State cases involved "high crime areas". In Robertson the Third Circuit was asked to decide the question, "whether an anonymous tip that contains only information readily observable at the time the tip is made may supply reasonable suspicion for a Terry stop in absence of police observations of any suspicious conduct?" Our Third Circuit said No. The conduct that the police observed in Robertson and Jones and the other cases cited above, is more on the suspicious side then the conduct exhibited by the Petitioner here at the time of his stop.

THE FACTS ON RECORD

On the evening of May 7, 2003, ~~an anonymous caller, who is identified as an unidentified concerned citizen at the time of the 911 telephone call,~~ a Delaware 911 operator dispatch recieved an anonymous call from a concerned citizen stating she was "concerned about an unfamiliar car parked ~~on~~ at the end of her driveway and several people got out of the car and pulled stocking masks over their faces, and one had put what appeared to be a pipe in their pants and went toward Packets Tavern", according to recem. operator.

So far as the record reveals, at this specific point in time which is relevant to our inquiry, nothing is known about the informant. More important, there is no discription as to the number of these individuals, their height, weight, race, color or discription of their clothing, shoes, build characteristics or anything else, except for the "stocking masks" and "pants", and they were

headed in the direction of Route 13, (one wonders if this informant could have actually observed anyone walking outside at night past the light from the lamppost located near the end of this driveway.)

At approximately 11:30 pm, the informer's tip was relayed over the police radio. Officer Slover responded to the call and pulled up to a lone single person walking on the pedestrian walk area of Route 13 within fifty feet of the intersection governed by overhead turn signals that allows both cars and pedestrians to cross Route 13 exactly where a small road leads to the anonymous tipster's driveway, the other direction leads to: (1) a housing development; (2) Beaver Brook Apts.; (3) Langollan Apts. (name has changed since 2003).

This stretch of Route 13 has a steady amount of foot traffic during the hours that petitioner was afoot here. There are three public businesses open until One o'clock am. They are a car wash, which is open 24/7 located directly across the highway from the Liquor Store. The Liquor Store, and across the parking lot a large Tavern that has seven or eight billiard's tables, serves hot food until one one-o'clock am, and of course alcohol. Many of its patrons walk in from the Two Apt. Complexes and Housing Complexes all within one-quarter to one-third of a mile, and significantly must cross Route 13 at the exact location where petitioner was stopped by police.

According to officer Slovers testimony, Petitioner did not

attempt to flee, he was not lurking in the bushes and small trees that line this 200 feet of pedestrian walkway, which is about 12 feet in width. Petitioner was not wearing pants, and did not have a "stocking" over his face. He was not being elusive, nor was he running. ~~The~~ Officer Slover did not say he observed a pipe, or a firearm, nor did he state Petitioner made any threatning or otherwise unusual movements. And neither was he accompanied by several other people. The police observed no indicia of criminal activity.

At this point police got out of their marked patrol car. ~~and ordered Petitioner to turn around Petitioner with their guns drawn~~. Ordered Petitioner to turn around. As they approached him they did not observe anything other than a man wearing coveralls and a small knit cap, both of which are common outerwear for a working man who may have been working outside in early May evening and had just gotten off a 3 to 11 o'clock shift, or even doing yard work around the house, or mechanic work on an automobile, lawnmower etc in his garage or workshop. However, the police stopped Petitioner, ~~grabbed him~~ took control over his movement and asked him "Do you have any weapons on you?" Petitioner was placed under arrest and subsequently indicted for possession of a firearm during the commission of a felony, attempted first degree robbery, and second degree conspiracy.

The State provided Petitioner with one of it's ineffective counsels, who failed to investigate both the law and the facts

in this case. Nevertheless, counsel moved to suppress the evidence seized by the police. Because of counsels unfamiliarity of the area on location, counsel was unable to articulate some of the materied facts above, his lack of investigation, a simple "drive through" investigation would have been sufficient. As a simple legal research on "anonymous tips" would have revealed the cases cited herein. And a simple review of 11 Del C § 1902 would have accomplished the same task.

Counsel filed a suppression motion that was unsuccessful and refused to appeal it to the Delaware ~~Suppreme~~ Supreme Court despite an accessable amount of caselaw supporting his clients case that the State had a much stronger case but were reversed based on a lack of reasonble suspiccion.

Counsel is deficient and Petitioner did not get a chance to get a "full and fair opportunity" to have the State Courts review his claim here. Kimmelman v Morrison 477 US

The "reasenableness of official suspiccion must be measured by what the officers knew before they conducted their search" Florida v J.L 529 US 266, 271 (2000) The Delaware Supreme Court articulated a two prong test in Quarles v State 696 A2d 1334, 1338 (Del 1997) The first prong consists of an officers objective observations in the totality of the circumstances of the "pattern or practice of behavior" of the lawbreaker, and the second prong is what inferences or deductions a trained officer could make which might elude an untrained person. Id at 1338.

Specifically, there is no good-faith exception that would allow a police officer lacking reasonable suspicion to create that suspicion through an unjustified attempted detention." Jones v State 745 A2d at 864. In Jones the Court found that the Superior Court incorrectly distinguished the officers safety exception from the need for an articulate suspicion. Id at 856 n. 18. Other wise nearly every invasion of a persons privacy could be justified by arguing the police needed to protect themselves from harm. Knowles v Iowa 523 US 113, 119 (1998)

There is no evidence officer Slover faced a hostile person, or that officer faced a large number of people either. The record reflects no circumstances here that would give officer justification for believing Petitioner was armed and presently dangerous.

In fact, the officers observations "added nothing to" the anonymous tipsters and "did not corroborate or particularize" the tipsters statements except to find a single person, present and alone on a well traveled highway. The only thing the officer did was "guess." First, he relied exclusively on the anonymous tipsters information. Second, he made a "guess" that by chance the man walking down this streach of highway just might be one of the individuals from the car in the driveway. Officer certainly did not observe "a pattern of criminal behavior." There was no testimony that this area was the focus of special attention because of prior criminal

activity either. It's a well known fact, most Liquor stores get robbed on occassion. There were no special police bulletins that police focus special attention on this area.

The location alone is insufficient suspicion that criminal activity is afoot. Particularly, on a busy highway surrounded by Apartment Complexes and Housing Developments. The fact that a person is walking through a "poorly lit" section of walkway certainly should not give rise to suspicious criminal activity, particularly where it is located between an intersection, that is well lit up and the Pockets Tavern and Car Wash parking lots which are very well lit up as well. The fact is that this area may have only been "poorly-lit" due to the extreme brightness at each end of this walkway, (or the possibility of a street light being out, although that may be irrelevant to the circumstances existing at this exact time) Location alone is insufficient suspicion. Cummings v State 765 A2d 945, 949 (Del 2001) (Police had responded to area several times for burglar alarms held not suspicious area) "It is well [established law] that a suspects presence in a high-crime area late at night is alone insufficient to constitute ~~articulate~~ reasonable articulate suspicion" Jones at 871; Brown v Texas 443 US 47, 52 (1979) However, a suspects presence in a high crime area plus his flight from police is one factor that may be concidered in the totality of the circumstances

in establishing reasonable suspicion. Jones supra.

In the case here, Petitioner did not take flight.

Petitioner was on public property open to the public, that is noted for regular flow of foot traffic to and from the three businesses open at 11:30 pm that evening.

Officer Slover admits he immediately stopped [illegible] and seized Petitioner, where he was not free to leave [illegible], he relied exclusively on the radio dispatch from an anonymous 911 call. There was no time for an independant observation from this officer other then "the location" and Petitioners "outerwear" which did not specifically match the dispatch discription. Riley v State 892 A2d 370, 375-78 (Del 2006); Florida v JL supra.; US v Roberson supra; Caldwell supra; US v Nash supra.

Had Petitioners Counsel filed a Direct Appeal citing the facts from the record there is a reasonable probability the out come would have been different, had Counsel did any research on this issue. Had Counsel even performed a "drive thru" investigation of this area (See attached Exhibit A, an outline map of Route 13, Pockets, the Traffic Signal lights, and the location of the driveway) Counsel could have had a better grasp of these facts. Had Counsel performed an interview of The Liquor Store employees, Pockets employees and Car Wash Manger they would confirm the foot traffic from the Apt. and Housing Complexes nearby. Had Counsel sat in the Liquor Store Parking Lot for an hour or two at around 11 to 11:30 pm he would have independant evidence

that these are customers entering all three businesses that do wear "coveralls" and "caps" of all sorts, in May, June and July. Had Counsel actually "walked" the streech of Route 13 in question, he would have discovered that the only reason this 200-300 feet section of walkway was "poorly-lit" is because at the traffic light and at the parking lot on either end is so powerfully lit up "like a day at 12 noon," that when one quickly passes each area, the "otherwise lit" area, just does not have the 6 or 20 "Halogen" lights that the traffic area and Parking lot does.

The Counsels ~~failure~~ failure to perform fact investigation on the elements at issue is defective performance sufficient to undermine the confidence in the Petitioners conviction for possession of a deadly weapon during the commission of a felony. ~~and attempt~~ Wiggins v Smith 539 US 510 (2003) (Counsels' failure to develop mitigating facts) 123 S.Ct 2527, 2538-39; Woodford v Viscott 537 US 19, 22-23 (2002) (To prove prejudice, Petitioner must establish a "reasonable probability" that but for counsels' unprofessional errors, the result of the proceeding would have been different. Strickland v Washington 688 US at 692. The Supreme Court rejected the proposition that the Petitioner must prove [the more difficult std.] "more likely than not" that the outcome would have been altered. Strickland at 692; Woodford at 22-23.

The State Courts misapplied the "governing legal principle" to "a set of facts different from those of the case in which

page 11

the principle was announced." Wiggins 123 SCT at 2534-35 (citing) Williams v Taylor 529 US 362, 413 (2000) (unreasonble application) see also: Lockyer v Andrade 538 US 63, 123 S.CT 1166, 1175 (2003) (citing Williams at 407).

State Courts objective unreasonable in fact finding in finding reasonable articulate suspicion, where Petitioner has showed by clear and convincing evidence in his trial record that the officer relied almost exclusively on an anonymous 911 tipster, and the State Court apparently supports this, in Harris v State 871 A2d 1128 (Table) 2005 WL 850421 (Del. Supr.) at *2 para.(9). (States Answer Exhibit A)

Had Counsel performed ~~an~~ adquate legal research and marshalled the facts developed at trial there is a "reasonable probability" the outcome on Petitioners Direct Appeal would have been different as to the finding of "reasonble articulate suspicion," possessed by officers at the time before petitioners initial seizure. Accord Taylor v. MADDOX 366 F3d 992 (~~2004~~ 9th cir 2004) (Explains AEDPA § 2254(d)(2) authorization of federal Courts to grant habeas relief in cases where the state court decision "was based on an unreasonable determination of facts in light of the evidence presented in the State Court proceeding") Or to put it conversely, a federal court may not second guess a state courts fact finding process unless, after review of the state court record, it determines that the State court was not merely wrong, but actually unreasonable.

page 12

Cf. Lockyer v. Andrade 538 us 63, 75 (2003)

Second § 2254(d)(1) determination of a factual issue made by a state court shall be presumed to be correct unless that presumption of correctness may be rebutted only by clear and convincing evidence. This 2254(d)(1) presumption of correctness only comes into play once the state courts fact findings survive any intrinsic challenge; they do apply to a ~~challenge~~ challenge that is governed by the deference implicit in the "unreasonable determination" standard of § 2254(d)(2).

This federal courts review standard under § 2254(d)(2) is whether the finding of "reasonable articulate suspicion" "was based on an unreasonable determination of the ~~facts~~ facts in light of the evidence presented in the State Court proceeding." "Deference does not by definition preclude relief. A federal court can disagree with a state courts credibility determination (ie: anonymous 911 call) and, when guided by AEDPA, conclude the decision was unreasonable." Taylor v Maddox supra (citing) Miller-EL v Cockrell, 537 us 322, 340 (2003). Indeed, the U.S. Supreme Court and Circuit Courts have all found the standard met. See Wiggins at 2538-39 (citing cases).

As noted, intrinsic challenges to State court findings come in several flavors under the "unreasonable determination" standard § 2254(d)(2). each presenting it's own set of considerations. No doubt the simplest is the situation where the state court should have made a finding of fact but neglected to do so. (anonymous "concerned citizen")

In that situation, the state court's factual determination is perfectly unreasonable and there is nothing to which the presumption of correctness can attach. Wiggins at 2539-40.

Or much like the case at bar, a somewhat different set of considerations applies where the state court does make factual findings, but does so under a misapprehension as to the legal standard. Taylor v Maddox supra (cites omitted) Obviously, where the State court's legal error infects the fact-finding process [particularly in a bench trial] the resulting factual determination will be unreasonable and no presumptions of correctness can attach to it. Taylor v Maddox.

Similarly, where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to Petitioners claim, that misapprehension can fatally undermine the fact finding process, rendering the resulting finding unreasonable. See e.g. Wiggins at 2538-39.

And, as the Supreme Court in Miller-EL noted, the state court fact finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports Petitioners claim. Miller-EL 537 US at 346. While the state courts are not required to address every jot and tittle of proof suggested to them, nor need they make detailed findings addressing all of the evidence before them. Id. at 347 To fatally undermine the state fact-finding process, and render the resulting finding unreasonable, the overlooked or ignored

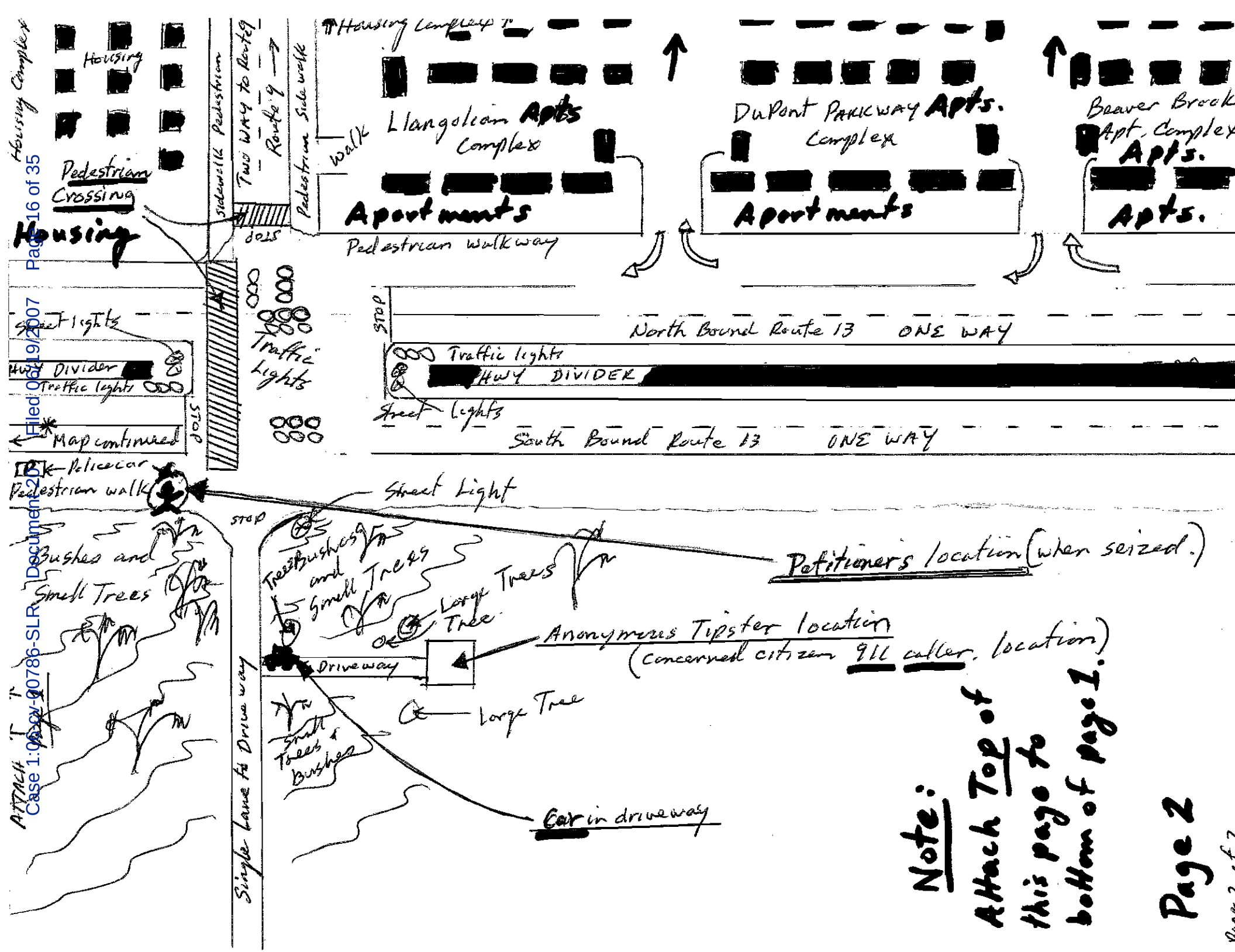
evidence must be highly probative and central to Petitioners claim. In other words, the evidence in question must be sufficient to support Petitioners claim when considered in the context of the full record bearing on the issue presented in the habeas petition. Taylor v Maddox supra But failure to consider key aspects of the record is a defective fact finding process Miller-EL at 346.

Petitions claim above meets all the criteria cited above. Please review and fully incorporate Petitioners complete Trial record transcripts as part of this claim.

Ineffective Assistance of Counsel on Direct Appeal incorporates all of the above facts and readily available citations. The Due Process Clause guarantees the right to effective assistance of counsel on first appeal. Evitts v Lucey 469 US 387, 396-99 (1985); Strickland 466 US 668, 687 (1987) Petitioner has identified Counsel unprofessional acts or omissions that are not the result of reasonable professional judgment. Counsel did not function under prevailing norms to make the adversarial testing process work in this particular case. Counsels decisions were outside the range of professional competent assistance. Counsel should have performed the minimal amount of legal research and reviewed the trial record and appellate the Superior Courts denial of his suppression motion to the Delaware Supreme Court accompanied with his knowledge and expertize in formulating legal arguments. Kimmelman Supra. (end of ground one)

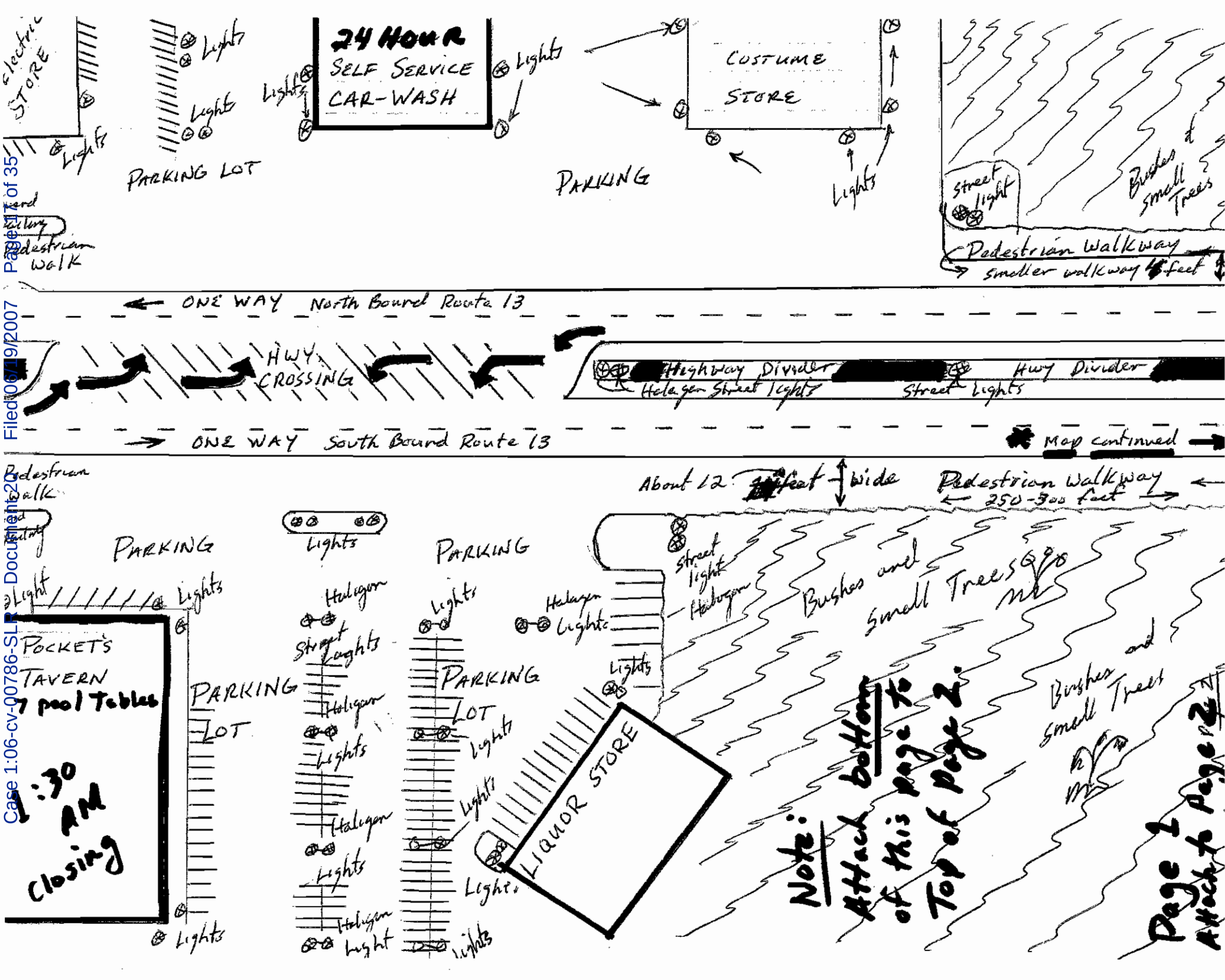
TWO PAGE DIAGRAM OF SECTION OF ROUTE 13

EXHIBIT A



Note:
Attach Top of this page to bottom of pg. 1.

Page 2



PETITIONER'S GROUND TWO - MIRANDA VIOLATION.

The argument the State Respondent's present in "their ground three," is essentially that the end result justifies the means. As explained above in ground one of this Traverse points and authorities which Petitioner is fully incorporating by reference, the 911 caller was an anonymous tipster. Giving an anonymous tipster a new name to that of an anonymous "concerned citizen" during the time period right before Petitioners seizure does not alter the legal landscape here.

The prejudice resulting from Petitioners answer is a "consent issue" under coersive conditions. It is also an admission of guilt. And is also permitted evidence to be used against him obtained in violation of both his fourth and fifth amendment rights, being the shotgun, and his statement answer as well as his other admissions of guilt which would not have been made had police not violated his rights to begin with.

Petitioner asserts his Trial and Appellant Counsel were Ineffective in counsel's failure to perform adequate legal research on this Miranda issue in the pretrial, trial and post-trial stages.

Petitioner reasserts his position above in ground one. The Respondent's concede that Petitioner was indeed seized for Miranda to come into effect, when police stood jumped out and told him, ~~police had drawn guns on the~~ Petitioner. Next, Respondent's assert that because Petitioner

to

to turn around

did have a gun on him at the time, that's okay. So they attempt to justify this after the fact by several tactics: (1) Look here this man is guilty [redacted] he had a gun on him and admitted he was involved in a conspiracy to rob the store; (2) [redacted] that the police were justified under the officers safety exception, [redacted] reasonable suspicion, he received 4th or 5th party information from an anonymous concerned citizen and that's all we need. (this call never stated "a gun", nor did it state "one person", "no coveralls", nor a knit cap. A group of people with stocking masks over faces) Nobody verified the reliability or identity of this 911 call informant, and (3) Well, that stuff might not fly, lets throw the Public Safety exception in this mix. A little dab of guilty man (emotional) value, a dose of, the police officers protect you too, so lets throw them a bone on officer protection, and use the Public Safety exception to frame this issue overall. We need to nail this guy, he's guilty. Let's expand the power of the State, I think that if a police officer only has a mere hunch, pull the guns on a citizen, [redacted] if he's clean we'll just let him go that all, no harm done, but we'll still be able to get a few more criminals off the street this way.

Enough, the people, the citizens walking along the roads at night who are not partaking in criminal activities, what about them? In Jones 745 A2d at 856 [redacted] (1998) n. 78. The Delaware Supreme Court addressed this exact issue and found that the State incorrectly distinguished the officers safety

page 17

exception from the need for an articulable suspicion. Id. (citing) Knowles v Iowa supra. The Respondent's place an emphasis on the 911 call that police "had reason to believe that Harris had a gun when they first approached him." Answer at 9 (emphasis added).

Rather then reargueing this point again, see ground one's extensive explaination and legal reasoning that asserts how both factually flawed under § 2254(d)(2) the argument is, and legally flawed to the point of being both contrary to law, and unreasonably determined.

The Public Safety exception is a "narrow" holding, created in New York v Quarles 467 US 649 (1984) Cf. US v Massenburg 2002 WL 2005443 (3rd cir) **2. (distinguished in that the shotgun was ~~found~~ seized incident to a lawful arrest warrent and arrest was either in a car or home) A gun in a car does not fall under the public safety concerns expressed in Quarles. U.S v DeSumma 272 F3d 176 (3rd cir 2001) (distinguished in that defendant was already under arrest and his un-Mirandized statements were suppressed. He was legally seized when statements made, the distinguishing factor in still allowing the seized gun in evidence, statement was a voluntary statement, and DeSumma was not unlawfully seized) Dickerson v US, 530 us 428, 441 (2000) (distinguishing Oregon v Elstad 470 us 298, 306 (1985) refusing to apply the traditional "fruits" doctrin developed in Fourth Amendment cases, recognizing that unreasonable searches and seizures under

the fourth Amendment are different then unwarned interrogations under the Fifth Amendment.)

Maryland v Pringle 124 SCT 795 (2003) brought about a change if it be, to the Miranda exclusion of evidence concering whether police officer had probable cause to believe that Pringle had commitied a crime. Officer asked Pringle if he could search his car, which was occupied by two other people and he found drugs. After Miranda warnings Pringle stated the drugs were his and the others knew nothing about them. Pringle claimed he was arrested without probable cause, that officers observation of a large roll of money in glove box did not provide probable cause to search car, or that Pringle had committed a crime. The Court held that "Any inference that everyone on the scene of a crime must disappear if Government informer singles out the guilty person. No one was singled out here and none of the three occupants provided information about ownership of the cocaine until after their arrest." Pringle supra. Delaware has rejected the federally recognized good-faith exception to search warrant requirements as well. Dorsey v State 761 A2d 807 (Del. 2000) (cited in) State v Devonshire 2004 WL 94724 (Del 2004) (officer mistaken about his authority to search) Cf. Jones Supra.

The Public Safety exception, the Respondents are boot-strapping "to the Terry stop. circumstances as an officer safety exception is explained in Jones at 856 n. 78.

and the Respondants' reliance on actual "public safety" is distingished in Quarles facts themselves.

First, the suspect had committed a crime, and the police spoke face-to-face with the victim, a distingishing feature in U.S. v Johnson 2004 WL 882151 (3rd cir 2004) Answer Exhibit D. (face-to-face tip from informant had sufficient indiccia of reliability to provide officers with a reasonable suspicion justifying stop and frisk of defendant) There was no face-to-face tip in the case at bar. Therefore, we can stop right here, and rest on ground one's reasoning that there was no reasonable suspicion to seize Petitioner.

However, if this Court refuses to uphold Petitioners ground one argument's we still have to deal with the reasonable suspicion issue here as well. Respondants' want this Court to rule that a sporting arm (shotgun) carried on a person, completely concealed to anyone else, in the safety of that person's clothing, ~~exactly~~ exactly as a person ~~carrying~~ carrying a lawful concealed deadly weapon as under permit to carry a gun, (mere possession of a gun is legal in Delaware) is a threat to public safety if he is walking down the road.

In Johnson supra the Third Circuit's NOT PRECEDENTIAL case, (See Roberson supra facts) relies on US v Valentine 232 F3d 350 (3rd cir 2000) which still involved a face-to-face informant distigishing it from Florida v JL supra. The distingishing "public safety" factor in

page 20

Johnson **3 n.1 the Court noted, however that the road rage incident... "involved a threat to the public safety," (citing) US v Hensley 469 us 221 (1985) (distinguished by Florida v JL and Jones and Robinson cases, "particularly in the context of felonies or crimes involving a threat to public safety it is in the public interest that the crime be solved and the suspect detained as promptly as possible)

Petitioner was not out waving his gun around and pointing it at members of the general public at large, as Johnson did at passing cars on a public highway. In Quarles the next distinguishing fact is that Quarels ran into a crowded Supermarket, and hid his gun in the supermarket where a child, shopper, or employee could find it and possibly ~~shot~~ shoot somebody. Maybe, if Petitioner had hidden the shotgun along the road in the bushes, the ~~Court~~ Quarles exception might fit that prong of factual circumstances. But, Petitioner did not create a Public Safety hazard in this case at bar.

The shotgun was "tucked safely away" from the public at large where nobody else could use it. The police did not have an reasonable articulate suspicion to seize him, or to believe Petitioner posed a threat to officers at that specific time before seizing Petitioner and questioning him as to whether he had a gun on him. (Please fully incorporate ground one, above, on this issue)

The particular distinction also present in this case is that

page 21

the States entire case revolves around this seizure of Petitioner and the "fruits" of that seizure, being the gun, possibly the hat he was wearing and his "in court confession" all derived from the seizure and Miranda violations.

Under § 2254(d)(2) explained above in ground one section only an unreasonable determination of facts can this case be upheld on Quarles. It also seems there were more than two officers with guns drawn pointing at Petitioner, no testimony that Petitioner was acting suspicious or had his hand in his coveralls grasping at anything. Petitioner was not surrounded by other people, he was alone, and the Petitioner is rather short and small built man less then 5 feet 5 inches and 135 lbs. had both ~~had~~ hands visible to officers all all times. Police did not even attempt to identify Petitioner, his business abroad or destination to dispel any "hunches" the officers may have had.

The officers, unlike the situation in ~~Quarles~~ Quarles were NOT confronted with the immediate necessity of ascertaining the whereabouts of a gun they had every reason to believe the suspect had just removed from the empty holster and discarded in the supermarket. In fact, in Petitioners case we have: (1) an unreliable informant as compared to Quarles victim eyewitness to a crime seeing the gun specifically. (2) More the one suspect compared to Quarles one identified suspect. (3) An appearance of a pipe, could have been a pool stick. Pockets Tavern has 7 pool tables (4) Group of people

headed in a general direction, caller basically guessed "this" because the group of people could have went across Route 13 as well, or to the 24 hour Car-Wash, or to Pockets to play pool, as compared to one lone man running directly into a supermarket. (5) stocking masks over faces, no hight, weight, body build, hair color, race, color, color of shirts no color of pants, no color of stocking masks, no description of shoes or boots, no discription of walk or gait ~~or~~ or any other distingishing characteristics that would have permitted these officers to stop and point their loaded pistols at Petitioner based simply on the 911 call and pulling up to him on the highway. (No Black ~~yellow~~ jacket with "Big Ben" on it)

The fact is, these officers were just lucky that ~~day~~ evening. It could have just as well been any hardworking man from any of the Dpt. complexes or housing developments within walking distance of this area.

If there were such exigent circumstances, why did not the Respondants rely on ~~Money~~ Mincey v Arizona 437 US 385 394 (1978).

In this case, unlike Quarles we do have an instance where Petitioners claim is that he was compelled by police conduct which overcame his will to resist. Quarles at 654 (citing Beckwith v US 425 US 341, 347-348 (1978); Davis v North Carolina 384 US 737, 738 (1966) when police pointed loaded pistols in his face, large tall police officers with police car lights shining in Petitioners eyes blinding him.

Furthermore, "the Fifth Amendments structures, are not removed by showing reasonableness" in police actions. Fisher v US 425 US 391, 400 (1976). A comparable case that was not overruled or distinguished by Quarles is Rhode Island v Innis 446 US 291 (1980) (where the suspect had hidden a shotgun near a school, the suspect is still entitled to Miranda protection)

Without a reasonable finding of facts in Petitioners case how is this Court going to rule on issues of law? The lower courts unreasonable determination of facts under § 2254(d)(2) leads to an unreasonable application of the clearly established Laws under Miranda in this case particular factual setting.

Therefore, all evidence taken as "fruit" of this involuntary statement in violation of Miranda should be suppressed. as evidence used to convict Petitioner of Attempted Robbery First Degree 11 Del C § 832(a)(2), and, Possession of a Firearm During the Commission of a Felony. 11 Del C. § 1448. Violative of the Fourth and Fifth Amendments in addition to Miranda, relying on involuntary "consent", and an involuntary "statement" answer, the distinction is that in this circumstances the "fruit" is to be excluded as "fruit of the ~~poisonous tree~~ poisonous tree".

These Two charges should be reversed.

page 24

PETITIONER'S GROUND THREE: Sufficiency of Evidence

The Petitioner bases his claim on the corpus delicti rule, State v Calvano 154 A 461 (Del 1936) that he did not commit a felony while he possessed a weapon (a weapon procured by use of unlawful seizure and involuntary confession) Jenkins v State 401 A2d 83 (Del 1979). And that in an attempted robbery case, the state did not establish evidence, independent of defendants confession, which tends to show that defendant attempted to take, exercise control over, or obtain property of another by use of threat of "immediate" force. DeJesus v State 655 A2d 1180, 1198, ~~1199~~ 1201, 1203 (Del 1995)(citing Opper v US 348 US 84, 93 (1954) Addressing the issue of corpus delicti as it relates to an attempted crime, citing Jenkins supra as a "consummated" offense.)

The Delaware Supreme Court despite the difficulties in a case of attempted robbery where the defendant is moving toward the commission of a crime in which a "substantial step" toward a robbery may be more demanding. The Court "believe[s] the attempted robbery carries a distinct corpus delicti. In order to establish the corpus delicti for any crime, the prosecution must introduce independent evidence of the criminal conduct forming the gravamen of the offense. (cite ommitted) The gravamen of a robbery or attempted robbery charge is a "taking" by "force". DeJesus at 1203-04: See State v Norris 73 A2d 720 (1950) (2 elements: taking property

page 25

(larceny) by violence or putting person in fear) The Court held, "that in an attempted robbery case, the State must establish evidence, aliunde the defendant's confession, which tends to show that the defendant (1) attempted to take, exercise control over or obtain the property of another (2) by the use or threat of immediate force.

Here "[i]t must be shown that Petitioner used or threatened force as a means to take the property of [a named victim.] Although the taking and the application of force need not be contemporaneous, there must be "a causual connection between the use ~~of force~~ or threat of force and the attempted theft. (cites omitted in DeJesus) If it is shown that [Petitioner] brandished [Displayed] the [gun] or otherwise threatened [unnamed victim] in order to take or appropriate his property, the State has sustained its burden of proving the corpus delicti of the crime. Without such independent evidence that [Petitioner] attempted to "take" or "appropriate" the property of [unnamed victim], however, his conviction cannot stand." DeJesus at 1204.

The State Respondents insist they have met this threshold because police officers observed him walking towards Pockets at the time of his arrest and Petitioner was carrying a ~~shotgun~~ loaded shotgun, and Petitioner admitted he had a shot gun on him. Disregarding the renounciation defense, the State was still required

page 26

to show, the ~~corpud~~ corpus delicti elements one being "a causual connection between the use of force and the [attempted] theft" DeJesus supra. The "use of force" according to statute 11 Del Cs 832 (a)(2) in a first degree attempted robbery is that Petitioner "displayed" what appeared to be a deadly weapon. There is no evidence Petitioner "brandished" or "displayed" the shotgun in order to "attempt theft." DeJesus at 1204. No evidence that Petitioner attempted to "take" or "appropriate" the property of an unnamed victim.

Because there was never a victim where Petitioner had "displayed" the shotgun and "attempted" to rob them. The fact that the Petitioner stated his intention can not be used here because it is insufficient under the corpus delicti rule. DeJesus at 1202 (citing) Bright v State 490 A2d 564, 569 (1985) (the "independant evidence" rule of corpus delecti delecti) It must be shown that Petitioner used or threatened force as a means to take property from unnamed victim. Id. Under statute this means a "display" of a firearm to an actual live victim/person.

Petitioner is actually innocent of this charge attempted First Degree Robbery 11 Del Cs 832(a)(2) because the "display" element has not be proven beyond a reasonable doubt. Nor was the element of "attempting" to take or appropriate anothers property.

page 27

Robbery requires the existence of a named human victim as a material element. 11 Del C § 832; Coffield v State 784 A2d 588, 592 (Del 2002).

The Delaware Supreme Court adopted a "two-part" analysis to apply the "display" requirements in § 832(a)(2).

The State Did Not Present Sufficient Evidence To Find That Petitioner Displayed What Appeared To Be A Deadly Weapon.

"First, the victim must subjectively believe that the defendant has a weapon. Second, the defendant's "threat" must be accompanied by an "objective" manifestation of a weapon." Walton v State 821 A2d 871, 874 (Del 2003) (emphasis added) "The objective manifestation requirement attributes a broad meaning to the term "display" in order to punish the robber who gestures toward something that appears to be a concealed deadly weapon." Walton ~~supra~~ at 874; Word v State 801 A2d 927 (Del 2002) (displays)

In this inquiry we don't even get to the "display" element because we don't do not have a named victim according to statute, interpretation by Coffield at 592 cited in Walton at 874. And we are missing the "attempted" theft from this victim. The fact is, Petitioner may have actually went ahead and entered the Liquor Store with the concealed Shotgun. Unless he "gestured" he had

page 28

a gun, any potential victim would not know he had a gun, as long as it was kept hidden and the Petitioner did not attempt to have a victim "take notice" of it, if petitioner did "attempt" "to forcably" take the property of another.

According to Walton, it could be possible for a robber to simply show up at a place of business with a weapon, but as long as he did not "boardish" or "display" it, either physically or by use of gesture or verbally stating so, the "display" element under § 832(a)(2) is not satisfied ~~and that individual is actually innocent~~ due to insufficient evidence under Jacksen v. Virginia 443 US 307, 324 n.16 (1979) as a matter of state law. Petitioners carrying a concealed shotgun where the police did not even observe it, is not the conduct ~~of~~ that can be construed ~~under~~ as a "display" or an "appearance", of a deadly weapon. Add that to the necessity that such a "display" must be during an "attempted" taking of property from a "named human victim". ~~[illegible] or [illegible]~~. These element have not been proven beyond a reasonable doubt, separately 11 Del C § 301(b). Petitioner has a right at trial to be presumed innocent of conduct of "display" until the State meets its burden of proof on this element beyond a reasonable doubt. Petitioner is not guilty of a first degree attempted robbery.

Possession Of A Firearm During The Commission Of A Felony: The state's evidence is insufficient to establish the elements of this charge beyond a reasonable doubt, in this "attempted" robbery.

There is a difference between a "consummated" First Degree Robbery and PDWDCF or PFDCF charges being separate and distinct offences. However in an "Attempted" First Degree Robbery citing the "display" section and P.F.D.C.F. under 11 Del C § 1448. Both statutes require the same proof. US v Redman 470 F. Supp 50, 56 (D. DEL 1979) (Attempted first degree robbery); Davis v State 400 A2d 292 (Del 1979) (attempted robbery first degree double jeopardy) These cases state that PFDCF is a duplicate charge in an "attempted" first degree robbery charge.

However, because the elements are not established by the State for a first degree robbery by Petitioner there is no felony.

Furthermore, the charge elements, one of which is that "a felony" is being committed, "during" the "commission". Petitioner did not use the gun "during" the "commission" of a felony, or "attempted" robbery because there is no "attempted" robbery element of "attempted taking" from a named victim. Walton supra, DeJesus supra.

While Petitioner may have had on his possession

a concealed deadly weapon, he is not charged with that offense here. Neither does Petitioner have to defend the elements of possession of a Firearm By a Person Prohibited, because he is not charged with that offense here.

The State did not meet their burden of proving their case for attempted first degree robbery. The State did not charge Petitioner with attempted second degree robbery. Thats not available here. The elements for "display" of § 832(a)(2) are.

The Second Degree Conspiracy. Petitioner is not adopting the Courts finding of guilt on this charge so that is clear. However, Petitioner is not Challenging the elements of this offense as it only curred one year and the time is served for this offense.

Respectfully submitted

Lynn Harris

Lynn Harris - Pro-se
Delaware Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Dated: 6/15/07

Certificate of Service

I, Lynn HARRIS, hereby certify that I have served a true and correct cop(ies) of the attached: "Petitioners Traverse To Answer," and "Petitioners Points & Authorities...Traverse" upon the following parties/person (s):

TO: James T. Wakley -DAG
Office of the Attorney General
820 N. French Street
Wilmington, DE 19801

TO: _____

TO: _____

TO: _____

BY PLACING SAME IN A SEALED ENVELOPE and depositing same in the United States Mail at the Delaware Correctional Center, 1181 Paddock Road, Smyrna, DE 19977.

On this 6 day of 15, 2007

Lynn Harris

Lynn Harris Pro-se
Del. Corr. Center
1181 Paddock Rd -
Smyrna, DE 19977

Lynn Harris
SBI# 297441 UNIT 22
DELAWARE CORRECTIONAL CENTER
1181 PADDOCK ROAD
SMYRNA, DELAWARE 19977

united states district court
wilmington delaware
Lock Box 18 "844" king street
clerk
19801